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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1881.

No. 102.

JACOB M. DUNCAN AND SIMON POEY,
Libellants and Appellants.

vs.

THE STEAMER "FRANCIS WRIGHT," HER ENGINES, ETC.
HUMPHREY E. WOODHOUSE AND JOSEPH RUDD, JR.,
Claimants and Appellees.

BRIEF FOR APPELLEES.

BUTLER, STILLMAN & HUBBARD,
Proctors for Appellees.

WILLIAM ALLEN BUTLER,
Advocate.

Supreme Court of the United States.

JACOB M. DUNCAN AND SIMON POEY,
Libellants and Appellants,

vs.

THE STEAMER FRANCIS WRIGHT, HER TACKLE, ETC., HUMPHREY E. WOODHOUSE AND JOSEPH RUDD, JR.,
Claimants and Appellees.

No. 102.

BRIEF FOR APPELLEES.

This cause comes up on the appeal of the libellants from a decree of the Circuit Court of the United States for the Southern District of New York, entered July 17, 1878, affirming a decree of the District Court, made February 20, 1874, dismissing the libel and for costs.

Decree of U. S. District Court, Record, fol. 216.
Decree of Affirmance, U. S. Circuit Court, Rec., fol. 404.

STATEMENT OF THE CASE.

The action was brought by the libellants for the recovery of damages for an alleged breach of contract of a charter party between them and the claimants, as owners of the steamship *Francis Wright*, under which the vessel was employed in an experimental voyage and attempt to transport a cargo of fresh beef from Galveston, Texas, to Philadelphia, by the use of a patented steam refrigerating apparatus fitted up in the hold of the vessel.

The attempt wholly failed, and the entire cargo of beef became spoiled and worthless during the voyage, resulting in a loss to the parties interested in the experiment, which they claimed was due solely to the unseaworthy condition of the boiler of the steamship, in violation of the terms of the charter party.

The LIBEL alleged the making of the charter party between the libellants and Messrs. Woodhouse & Rudd, the claimants, September 13, 1872, for the term of six months, of the steamer *Francis Wright*, to run between Philadelphia or New York and Galveston, the vessel to be kept tight, staunch, well fitted and provided with every requisite for the voyage; the whole of the vessel, except necessary room for sails and cables, to be at the sole use and disposal of the charterers; Woodhouse & Rudd to nominate, and charterers to appoint, the chief engineer, to be paid by charterers, who were also to appoint the captain, subject to the approval of the owners.

The libel then alleged that the libellants took the steamer to Philadelphia, where they fitted her with refrigerators and other appliances for bringing a cargo of fresh beef from Galveston to Philadelphia, and then dispatched her to Galveston; that on the outward voyage the vessel gave signs of unseaworthiness in the blowing and leaking of some of her boiler-tubes, by which the time of the voyage was fourteen days instead of ten days, the usual time; that at Galveston the chief engineer was notified by libellants to make repairs, &c., but refused, whereby the steamer, having taken a cargo of about seventy tons of fresh beef, was, on October 31, 1872, being then four hours at sea, out of the port of Galveston, compelled to put back there for repairs by reason of the boiler tubes again blowing out and leaking, and was detained at Galveston seven days for repairs, leaving there again November 7, 1872, and was fifteen days making the passage to Philadelphia, owing to the unseaworthy and defective condition of the boiler. That by reason of said detentions and the unseaworthy condition of the boiler, and also of hot water which escaped from the boiler tubes and was negligently allowed to run into the steamer's bilge and melt the ice in the refrigerators where the fresh beef was stowed, the beef became spoiled and entirely lost, to the damage of libellants. $30,000,

which they claim to recover, &c. (*See Libel, fols.* 1–8, *Charter Party, Ex. A, fols.* 9–11.)

The ANSWER (filed January 7, 1873) admitted the making of the charter party, and the appointment of chief engineer and captain, and that libellants took possession of the vessel under the charter, and had the entire charge of her, claimants being ignorant of the use to which she was put.

The answer wholly denied all the other material allegations of the libel, and averred that the steamer, so far as the claimants were bound to do, was kept as called for by the charter. (*See Answer Rec., fols.* 21–23.)

The cause was heard upon the pleadings and proofs, before the Honorable SAMUEL BLATCHFORD, District Judge, January 28, 1873. (*Rec., fol,* 24.)

The District Judge rendered a decision, holding that the libellants had failed to make out the cause of action set forth in the libel, and dismissing it with costs. (*Rec., fols.* 223–233.)

After the rendering of the decision the libellants applied for a new hearing on further evidence. The application was denied, and a decree dismissing the libel was entered February, 20, 1874. (*Decree, Rec., fol.* 216.)

The libellants then appealed to the Circuit Court, and pending the appeal, further testimony was taken on behalf of both parties. (*Rec., fols.* 234–402.)

The cause came on to be heard in the Circuit Court, before Mr. Justice WARD HUNT, Associate Justice of the Supreme Court of the United States, May 23, 1878. (*Rec., fol.* 402.)

The Circuit Court affirmed the decree of the District Court, and decree of affirmance was entered July 17, 1878. (*Decree, Rec., fol.* 404.)

The findings of fact and conclusions of law of the Circuit Court are set forth in the Record, at *fols.* 420–431, and the opinion of Mr. Justice HUNT at *fols.* 432–446.

The libellants excepted to certain of the findings of fact,

process never before applied upon a similar scale, incurred all the risks incident to the experiment; and that the experiment being to preserve a perishable cargo liable to spoil from causes not incident to navigation, and which could only be preserved by the successful use of a patented process and apparatus, the working of which was wholly under the control of libellants, and the defective construction and working of the same having caused or contributed to the damage, no recovery could be had by libellants. The Court accordingly affirmed the decree of the District Court dismissing the libel. (*Rec., fols.* 429-431.)

POINTS.

First Point.—This cause has been twice tried, first in 1873, before Judge BLATCHFORD, while District Judge of the Southern District of New York, and again in 1878, before Mr. Justice HUNT, holding the Circuit Court in that district.

The District Judge held that the voyage was experimental, and that the evidence tended to show that the spoiling of the beef "was due to a want of sufficient ice, or if there was ice "enough, to the inability of the apparatus to preserve the beef" (7 Ben., 88, *p.* 99, *Rec., fols.* 231, 232.)

He held that it was not enough "to show the unseaworthy "condition of the boiler tubes, and that the vessel was de- "tained at Galveston to repair them * * and that hot "water escaped and ran into the bilge, and some ice was "melted from that cause. It must be shown that, but for such "things, the beef would have been, and was unspoiled and "merchantable as fresh beef." (7 Ben., 96, *Rec. fol.* 229.)

And he correctly held that the burden was on the libellants to show satisfactorily "that the beef was spoiled and lost through "the causes set forth in the libel." (7 Ben., p. 96, *Rec., fol.* 229.)

In the Circuit Court, the libellants produced further witnesses and evidence in support of their claim, which the claimants

met by contradictory evidence, and the whole case was fully retried.

The learned Justice at the Circuit Court held, upon a full and careful examination of all the testimony, that "the de-"struction of the beef was not owing to any cause for which "the owners of the vessel were responsible;" also, "that a de-"fective principle in the refrigerating machinery would ac-"count for it, or a defective operation or management of an "apparatus founded on sound principles, or the want of a suf-"ficient quantity of ice would explain it," but it was "*not at-"tributable to defects in the boiler or other unseaworthiness of the "vessel or its equipments, for which the owners are chargeable.*" (*Opinion, Rec., fol.* 445.)

He also held, as a matter of fact, that the boiler was seaworthy. (*Ib.. fol.* 428.)

Second Point—The evidence having been conflicting, and both the District and Circuit Courts having reached the same conclusion upon the question of fact involved, in respect to which the burden of proof was upon the libellants, this court would not, even before the Act of 1875, disturb the decree appealed from. In such cases, where the District and Circuit Courts concurred in opinion on the material facts, and there was "testimony supporting their decision," this court would "not reverse it on doubts raised by the ingenuity of "counsel."

The Hypodame, 6 Wall, 216, *p.* 223.
The Grace Girdler, 7 Wall, 196, *p.* 204.
The Quickstep, 9 Wall, 665, *p.* 669.

Third Point.—Since the Act of February 16, 1875, this court has uniformly held that upon an appeal from a decree in Admiralty, rendered since the Act went into effect, May 1,

1875, the findings of fact in the Circuit Court are conclusive and the evidence will not be weighed by this court.

The Abbotsford, 98 U. S., 440, *p.* 444.
The Benefactor, 102 U. S., 214, *p.* 218.
The Adriatic, 103 U. S., 730.
The Annie Lindsley, October Term, 1881, *Opinion of Mr. Justice* WOODS, *p.* 2.

The discussion of the evidence in the brief of the learned counsel for the appellant, for the purpose of establishing the proposition that the libellants made out affirmatively the cause of action alleged in the libel, notwithstanding the conclusions of the District and Circuit Courts to the contrary, is therefore, wholly irrelevant.

This court has said, at the present term, in reference to appeals of this description, "we have no right to look into the "evidence or the opinion of the court to ascertain the facts. "The evidence is not properly in the record sent up to this "court; it has no business there; and by an amendment to "Rule 8 of this court, promulgated May 2, 1881, it is excluded "from the transcript."

The Annie Lindsley, ut supra.

The decree of the Circuit Court should therefore be affirmed.

Fourth Point.—The appellants concede that the evidence cannot be considered under the Act of 1875, but they claim, notwithstanding the adjudication of this court in the *Abbotsford*, 98 *U. S.*, 440, that the act is unconstitutional. We do not propose to enter upon the discussion of the constitutionality of the Act, at length, as we suppose it to be, substantially, *res judicata* in this court. Wholly aside, however, from this question, the decree should be affirmed upon the ground that, in all appellate courts, in actions for damages resulting from alleged breach of contract, where the burden of proof is on the plaintiff to show affirmatively that the damages claimed were the direct result of the breach, and where the evidence

was conflicting, and has been weighed and passed upon by the jury, referee or Court, whose decision is sought to be reviewed, the appellate court will not reverse, on the facts, unless the finding below was clearly against the evidence. This rule applies where there is no restriction as to an examination of the facts by the appellate court.

Talcot. v. Commercial Ins. Co., 2 Johns, 467.
Fowler v. Ætna Ins. Co., 7 Wend., 270.
Culver v. Avery, 7 Wend., 380.
M'Lanahan v. Universal Ins. Co., 1 Pet., 170.
Stanley v. Whipple, 2 McL., 35.
And the cases cited in this court, supra, p. 7, *ante.*

Fifth Point.—If the court shall consider it necessary to pass upon the question of the constitutionality of the Act of February 16, 1875, we submit that the act must be upheld, as a proper exercise of the power expressly conferred upon Congress by the Constitution, in the provision which makes the appellate jurisdiction of the Supreme Court in admiralty and maritime cases, both as to law and fact, subject to such exceptions and regulations as Congress may prescribe.

1st. The Constitution vests the judicial power of the United States "in one Supreme Court, and in such Superior "Courts as the Congress may from time to time ordain "and establish" (Art. III., § 1).

It then provides that the judicial power shall extend to the several cases enumerated, among which are "cases "affecting ambassadors, other public ministers and con- "suls;" "all cases of admiralty and maritime jurisdic- "tion," and various cases in which a State is a party (§ 2). After this enumeration of cases, occurs the following provision:

"In all cases affecting ambassadors, other public min- "isters and consuls, and those in which a State shall be a

" party, the Supreme Court shall have original jurisdic-
" tion. In all the other cases before mentioned, the Supreme
" Court shall have appellate jurisdiction, both as to law
" and fact; with such exceptions and under such regula-
" tions as the Congress shall make."

2d. The jurisdiction thus conferred upon this court in admiralty cases rests upon the Constitution, and no act of Congress can enlarge or abridge it (*The Lottawanna*, 21 Wall., 558, *p.* 576), but it is appellate and not original, and the exercise of the appellate jurisdiction in this class of cases, as well as in all others, is under the regulation of Congress.

In *Ex parte McCardle*, 7 Wall., 506, *p.* 512, this court say that the appellate jurisdiction of the court is, "strictly speak-
" ing, conferred by the Constitution. But it is conferred
" with such exceptions and under such limitations as Con-
" gress shall make," and the court add, "the power to
" make exceptions to the appellate jurisdiction of the
" court is given by express words," *p.* 514

And see Ex parte Yerger, 8 Wall., 85.

3d. Accordingly, Congress has, from time to time, regulated the exercise of the jurisdiction of the Supreme Court in respect to writs of error, as well as appeals in equity and admiralty cases, by acts limiting appeals with reference to the amount in controversy, prescribing the method of procedure and defining the subjects which shall be embraced in the appellate jurisdiction. And the jurisdiction conferred by the Constitution cannot be exercised in any other form, by any other mode of proceeding, or to any greater extent than that which Congress prescribes.

Durousseau vs. *U. S.*, 6 Cr., 314.
Barry vs. *Mercein*, 5 How., 103, *p.* 119.
U. S. vs. *Curry*, 6 How., 106.
Forsyth vs. *U. S.*, 9 How., 571.
Walker vs. *Taylor*, 5 How., 64.

4th. It is not essential to the appellate jurisdiction that a re-

examination of the facts in admiralty cases should be made by this court. In the exercise of the appellate jurisdiction in common law cases, the court reviews only questions of law, and while, by the Practice Act of 1872, the practice, pleading, form and mode of proceeding in such causes, other than equity and admiralty causes, in the Circuit and District Courts are required to conform to those existing at the time, in like causes, in the courts of record of the State within which the District and Circuit Courts are held, the review of a common law case in this court is regulated by the Acts of Congress, and not by the laws of a State.

17 *U. S. Stats. at L.*, 197, *R. S.*, §. 914.
Boogher vs. *Ins. Co.*, 103 U. S., 90, *p.* 95.

Under the Act of March 3, 1865 (R. S., §§ 649, 700), which prescribed a mode of determining questions of fact by the court without a jury, quite similar to the mode of determination of the facts in the admiralty courts, and allowed a review upon writ of error *or appeal* in this court upon a bill of exceptions, it was repeatedly held that the facts as found and stated by the Circuit Court are conclusive.

These decisions have been regarded by this court as authoritative in support of the action of Congress in making provisions for relieving the court from the unnecessary labor of sitting as jurors on a third trial in admiralty cases.

The Abbotsford, 98 U. S., 440, *p.* 445.

5th. There is, therefore, no ground upon which the extension by Congress to admiralty cases of the established rule in respect to questions of fact, and their review can be challenged as repugnant to the Constitution. The Act of 1875 was within the express grant to Congress of the power of regulation in respect to the exercise of the appellate jurisdiction. It is substantially a recurrence to the original provisions of the Judiciary Act of 1789 (1 *Stats. at L.*, 73), and the rule of this court as given in *Wiscart* vs. *Dauchy*, 73 Dall., 321, *p.* 324.

Sixth Point.—There was no error in the refusal of the Circuit Court to find the facts requested by the libellants.

The Circuit Court having found all the facts material and necessary to support its conclusions of law and the decree based thereon, this court "will not listen to complaints that "the Circuit Court refused to find certain facts, which it was "asked to find, or found certain other facts which the weight "of the testimony did not warrant."

The Annie Lindsley, ut supra.

The Court found, as a matter of fact, that the "claimants, as owners of the steamer, "kept and performed the covenants of "the charter party on their part, and that the vessel was kept "tight, staunch, well fitted and tackled and furnished with every "requisite for the voyage," and also found that the boiler was "efficient and seaworthy." (*Findings* 12 *and* 15, *fols.* 427, 428.)

> The appellant's counsel excepted to the refusal of the court to find, in addition, certain specific facts about the condition of the boiler. And he now claims, *first*, that these facts were material; and, *second*, that if found they would lead to an opposite conclusion as to the actual seaworthiness of the boiler and establish the breach of covenant insisted on by the libellants.

We answer:

1st. The facts refused were wholly immaterial. The most that could be inferred or that could have been found, in any view of the evidence, was that, owing to the leaking of some of the boiler tubes, the voyage was delayed. (*See opinion of* BLATCHFORD, *J., fol.* 226, 7 Ben., *p.* 93.) But this did not establish the fact that the spoiling of the beef was the result of the delay. Both the District and Circuit judges, while differing as to the fact of the seaworthiness of the boiler, agreed as to the fact of the delay, and also agreed as to the fact that the spoiling of the beef was not caused thereby. If, therefore, the Circuit Court had found all the items of deficiency in the boiler as requested by appellants, and had also found, as requested,

that the boiler was unseaworthy, this would not have varied or affected the result, so long as the court found that the libellants failed to prove that the spoiling of the beef was not produced thereby, but by other specified causes over which the claimants had no control.

2d. The 12th finding of the Circuit Court is one of fact, and supports the conclusions of law. There is nothing for this court to review. If the court had refused to pass at all on the question of seaworthiness of the boiler, and this question had been essential to the determination of the case, it might have been ground for exception, but a mere refusal to find certain incidental facts where the main and controlling fact has been found, is not error. See the cases cited in appellant's brief.

James vs. *Cowing*, 82 N. Y., 449, *p.* 457.
Smith vs. *Glens Falls Co.*, 62 N. Y., 85–87.

3d. The contention that the 12th finding of fact is a conclusion of law and not of fact is untenable. The seaworthiness of a vessel or its boiler, like the soundness of a man or of one of his organs, must necessarily be a question of fact. Evidence tending to show unsoundness in either case raises a presumption which must be repelled by counter evidence, but the question remains one of fact (*Cort* vs. *Delaware Insurance Co.*, 2 Wash., 375, *p.* 376), and because the evidence against soundness may be such as to exclude the contrary presumption, this does not change the character of the inquiry. But even if this objection were well taken, it is met by the 15th finding, which expressly finds the facts as to the boiler, and is conclusive.

Seventh Point.—There was no error in the conclusion of law of the Circuit Court, excepted to by the libellants, that the covenant in the charter party as to seaworthiness "was a "covenant of seaworthiness relating to the navigation of the "vessel for the voyage, and did not impose upon the libellants

" any duty or obligation in reference to any special or peculiar " use to which the libellants saw fit to put the vessel."

First Conclusion of Law, Rec., fol. 429.

1st. The contract was for the hiring of the vessel for a specified term, and for a designated voyage at a fixed rate of compensation. By its express terms, the whole of the vessel, with the exception of the necessary room for the sails and cables, was to be at the sole use and disposal of the charterers. The covenant of the owners as to seaworthiness, " that the vessel in and during the voyage specified " in the charter party should be kept tight, staunch, well- " fitted, tackled and provided with evey requisite *for such* " *a voyage*," was a general covenant of continuing seaworthiness on the voyage. It had reference to the ordinary use of a freighting vessel. It cannot be construed as applicable to any extraordinary or experimental use to which the charterers might see fit to put her. Still less was it a warranty against possible damage to the cargo resulting from such extraordinary or experimental use.

2d. The fact that the charterers asked and obtained permission from the owners to alter the vessel so as to fit her for carrying and preserving a cargo of fresh beef, according to a plan and patent of their own, did not charge the owners with knowledge of the peculiar nature of such plan, the mode of its operation, or the special risks to which the cargo would be subjected thereby.

The charterers were not bound by the charter party to employ the vessel in testing the experiment they had in view when they hired her, nor were the obligations of the owners, under the charter party, increased by the information that the charterers intended so to employ her. The parties must stand upon their written contract, which cannot be varied or enlarged by extrinsic circumstances. Nor will the court, by construction, make a new and different contract between them, or construe their actual contract otherwise than according to its plainly expressed intent. " It is not admissible to add to or engraft upon the con-

tract new stipulations nor to contradict those which are plain" (*per* NELSON, *J.*, *in Oelrichs* v. *Ford*, 23 How., 49, p. 63).

Riley vs. *City of Brooklyn*, 46 N. Y., 444.
Lowber vs. *Le Roy*, 2 Sand., 202.
Renard vs. *Sampson*, 12 N. Y., 561.
Long vs. *N. Y. Central R. R. Co.*, 50 N. Y., 76.
Mumford vs. *McPherson*, 1 Johns., 414.
Collender vs. *Dinsmore*, 55 N. Y., 200.
Mott vs. *Ritchmeyer*, 57 N. Y., 49.

Eighth Point.—There was no error in the third conclusion of law of the Circuit Court, that the libellants having failed to prove that the damage to the cargo of beef was the direct and natural result of any breach of the covenant of seaworthiness, are not entitled to recover (*Rec., fol.* 430).

1st. There is no assignment of error to the second conclusion of law which states the rule, that under the charter party the owners could be held liable, in case of breach of the covenant of seaworthiness, only for such damage as was the direct and natural result thereof; and the exception to this conclusion (*Rec., fol.* 450), is untenable.

2d. The court having found, by the eleventh finding of fact, that the spoiling of the beef and consequent damage was caused by the defective construction and working of the refrigerating room and apparatus, either from inherent defects or from not using a sufficient quantity of ice, and not by the fault of the claimants, the case is brought directly within the rule of law above stated.

4th. The appellants claim that the damage is shown by the findings to have been the result of the delay of nine days on the voyage, caused by the unseaworthy condition of the boiler. The fact of the delay is found, but the additional fact is also found, that the spoiling of the beef resulted

from other causes; and, as this latter finding is conclusive, there is nothing on which to base the claim of error in the third conclusion of law, which is a necessary result of the finding of fact.

4th. The rule is well settled that where the question is left in doubt whether the damages claimed are the direct consequence of the breach of contract complained of, or resulted from some other independent or contributing cause, no recovery is permitted.

The damages must be shown to have been the necessary result of the breach.

Hamilton vs. *McPherson*, 28 N. Y., 72.
Wilson vs. *Newport Dock Co.*, 1 Law Reports Exch. Case, 177.

Tested by this well-settled rule, the libellant's case wholly failed. Even if the breach of the covenant of seaworthiness, which looked only to the general condition of the steamer, her boiler, machinery, etc., for the voyage had been proved, the damages resulting from a failure of the experiment by which the vessel's hold was converted into a navigable refrigerator for transporting and preserving fresh beef on a long voyage, cannot be held to have been either the direct or necessary result of a breach, or to have been fairly within the contemplation of the parties when the contract was made. But, even if this could be held, the libellants wholly failed to show, with any degree of certainty, that the damages claimed were the result of such supposed breach of the covenant. The court found that the failure of the experiment, and the consequent loss to the parties engaged in making it, were the direct results of the imperfect construction and working of their own defective apparatus, or their insufficient supply of ice. This is conclusive against any right of recovery.

Ninth Point.—There was no error in the fourth conclusion of law of the Circuit Court, that the vessel being at the sole disposal of the libellants, they incurred all the risks incident to fitting her up for a special purpose, and to try an experiment in preserving a perishable cargo, by a patented process never before applied on a similar scale.

1st. The nature of the experiment which the libellants attempted, and the conditions of its success, are shown by the fourth, fifth, sixth and seventh findings of fact (*Rec., fols.* 422–424). The voyage was to test the patent and process (*Seventh finding, fol.* 423), new, and doubtful at best, and the contingency of failure was necessarily involved. Success was attainable only in case of the perfect working of the apparatus, and the maintenance of a uniform temperature to be secured by a sufficient supply of ice. The owners had no control over any of these arrangements, no knowledge of the apparatus or its use, and no means of aiding or facilitating the success of the experiment.

2d. Under the charter party, the charterers had the entire and exclusive possession and charge of the steamer. The fact that the owners nominated the chief engineer, who was appointed by the charterers, did not in any manner affect the control of the charterers over the vessel. The chief engineer was their servant, and, after the vessel went into their possession, they alone were responsible for its management. The provision of the charter party, giving the owners the right to nominate the chief engineer was for the purpose of securing the services of a competent engineer, just as the clause making the charterers' appointment of the captain subject to the approval of the owners was designed to secure a competent master. The chief engineer was no more the agent of the owners because nominated by them, than the master was because his appointment was subject to their approval. This being the case, the responsibility and risk of the use of the vessel for the special and peculiar purpose which the charterers attempted, belonged solely to them.

Tenth Point.—The Circuit Court properly found, as a conclusion of law, that the damage must be attributed to the want of success on the part of those who attempted this novel method of preserving a perishable cargo, by the use of a new invention. The owners of the steamer never intended to warrant the successful working of a patent apparatus, of which they know nothing, which had never been tried upon a vessel corresponding in size or build with the *Francis Wright*, and in respect to which there is no evidence that it has ever succeeded, unless on a very limited scale. No such obligations can be implied from the terms of the charter party, or from any of the circumstances of the case. It would be an unparalleled application of the rule of damages to visit upon the owners of the vessel a loss resulting from the failure of an experiment, untried before, and plainly proved to have been attempted, in this instance, in a manner and by appliances so defective as to insure failure instead of success.

Eleventh Point.—The decree of the Circuit Court should be affirmed, with costs.

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